



The Precautionary Principle in the Law of the Sea

Modern Decision Making in International Law

Publication

[Thesis](#)

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The Doctoral Thesis of Simon Marr, lawyer with Ecologic Legal, has been published. The purpose of this study is to examine the present status of implementation of the precautionary principle in the law of the sea and to extract evidence of its acceptance as part of customary international law. The thesis examines the precautionary principle in the law of the sea. The precautionary principle is a risk management tool for policy makers which has been broadly implemented in international environmental law in a variety of different sectors and formulations. It is best described in Principle 15 of the Rio Declaration which states that "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".

For example, it is commonly applied in the area of health, the environment and sustainable development. Despite the fact that it has been implemented in a number of international treaties as well as national laws, its content and status is still highly debated and various questions arise which make further examination of the precautionary principle necessary. Questions such as: its status as a rule of customary international law including its scope, addressee, triggering threshold, precautionary action measures, and eventually limits of the precautionary principle still have not been clarified, and it seems as if vagueness and ambiguity preclude a more detailed evaluation of these questions.

Thus, the purpose of this study is to examine the present state of affairs regarding the implementation of the precautionary principle in the law of the sea and to extract evidence of its acceptance as part of customary international law.

The scope of this study is limited by its primary focus upon the precautionary principle in different sectors in the law of the sea, i.e. pollution of the marine environment, conservation and management of marine living resources, and transboundary transports of radioactive and hazardous wastes. To this end, it is deemed important to scrutinize the precautionary principle on a sector-by-sector basis, discovering whether it has been implemented in different sectors differently.

As environmental protection is difficult to restrict to specific sectors, however, in some cases the scope has been extended to areas not directly linked to marine environment, i.e. air emissions of hazardous substances. Furthermore, this study is not meant to be exhaustive, focusing only on the most pertinent international or national implementations of the precautionary principle in the relative sectors.

Moreover, Chapter 4 draws upon national court decisions dealing in most cases with the licensing requirements of the relative authorities and which have no direct bearing on marine pollution. This study takes these licensing requirements into account, since the overall sector in which the courts decided was that of environmental protection. Hence, they are secondarily related to the marine environment and could serve as an indicator for the justiciability of the precautionary principle in national jurisprudence.

Chapter 1 sets out the history and some basic considerations of the precautionary principle. Chapter 2 identifies the key to the precautionary principle: science and its implications. Chapter 3 formulates limits to the precautionary principle. The subsequent chapters then turn to the state practice in different sectors: Chapter 4 - pollution of the marine environment, Chapter 5 - marine biodiversity, Chapter 6 - dumping of radioactive and hazardous substances and incineration, Chapter 7 - conservation and management of marine living resources, and Chapter 8 - transboundary movements of radioactive and hazardous substances, where the implementation of the precautionary principle in international agreements, national legislation and its application in litigation as far as available will be scrutinized. Chapter 9 sets out the prerequisites for state practice as accepted custom, which would also be the applied standard for finally evaluating whether the precautionary principle has evolved into a rule of customary law. Last but not least, Chapter 10 will draw some preliminary conclusions.

Key conclusions

One key conclusion of this thesis is the fact that the precautionary principle has developed from a "soft law" instrument with only guiding qualities for policy makers to a "hard rule" of customary international law in the sectors of pollution of the marine environment and conservation and management of living marine resources. This thesis demonstrates that as a minimum standard, the precautionary principle as a rule of customary international law is best reflected in Principle 15 of the Rio Declaration. It also shows that there is an emerging practice of law which makes the precautionary principle subject to a proportionality test which includes a cost-benefit analysis. In addition to these findings, this thesis shows which sectors of the law of the sea the precautionary principle is being applied to in a common way. To this end, it indicates that there is also an emerging practice of international law, which includes, inter alia, to make GMOs subject to a strict risk analysis, discharge ballast water on the high seas, decommission disused offshore platforms on land or make the transit passage of ships carrying radioactive or hazardous waste dependent on prior notification or authorization.

Furthermore, this thesis argues that in relation to procedural matters, the precautionary principle as a rule of customary international law includes the switch of the burden of proof. Accordingly, the onus of proof for the harmlessness of the effects of an environmentally sensitive activity lies with the one wanting to pursue the activity. To this end, under certain conditions the application of the precautionary principle as a rule of customary law can also have an impact on the provisional measures according to Art. 290 (5) of the Law of the Sea Convention.

Here, you will find a [book review](#) of this publication by the American Society of International Law in its Newsletter, Issue No. 29: October 2003.

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Dr. Simon Marr LLM

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